

KIM (Migration) [2019] AATA 6210 (28 October 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Thi Pich Kim
VISA APPLICANT:	Mr Porkong Chhai
CASE NUMBER:	1715139
DIBP REFERENCE(S):	BCC2016/1579592
MEMBER:	Maira Brophy
DATE:	28 October 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 28 October 2019 at 3:03pm

CATCHWORDS

MIGRATION – refusal – Partner (Provisional) (Class UF) visa - subclass 309 – applicants are currently not in a genuine spousal relationship– inconsistent and conflicting evidence – not a credible witness – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, r 1.15, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 May 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 April 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 of Schedule 2 to the Regulations because the delegate was not satisfied the parties were in a genuine and continuing relationship.
4. The review applicant, Ms Thi Pich Kim appeared before the Tribunal on 13 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mrs Bory Em and Ms Sok Yeng Chhai.
5. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Background

8. The visa applicant is a 65-year-old male who resides in Cambodia. He was previously married to Kim Von Chiv in the period from 1970 to 2010. He has four sons and two daughters who are all residing in Cambodia. The visa applicant's parents are deceased, his three sisters and one brother reside in Australia.
9. The review applicant is a 72-year-old female living in Sydney. She was previously in a de facto relationship in the period from 1982 to 2011. Her parents are deceased and she has one sister residing in Australia.
10. At the time of the application the parties stated they met at a party with family in Australia on 23 October 2015. On 27 April 2016 they applied for a Prospective Marriage (Subclass 300) visa. The applicant travelled to Australia on 21 November 2016 on a Visitor visa. On 27 November 2016 the parties were married. A copy of the Marriage certificate was provided to the department on 22 December 2016 along with notification to amend the application to a Partner (Provisional) (Class UF) visa.
11. The visa applicant was interviewed face to face on 24 January 2017 by a Department of Immigration officer. A telephone interview with the review applicant was conducted on the same day.

12. The delegate who made the original decision noted the following issues:
- There was no evidence of joint financial purchases or any shared financial responsibilities.
 - While there was photographic evidence there was limited other evidence the parties had declared their relationship to the wider community.
 - There were no characteristics of the parties being in a genuine spousal relationship.
 - The delegate was concerned the application was really an application for the visa applicant to join his siblings in Australia rather than a genuine partner application.
13. Prior to hearing the applicant provided the following:
- Vodafone accounts in name of review applicant for period from 11 September 2017 to 13 October 2017.
 - Photographs.
 - A statement from the review applicant and the visa applicant dated 12 February 2018.
 - Travel documents including airline tickets and receipts for accommodation.
 - Wedding invitations to the review applicant and applicant.
 - Money transfers from review applicant to visa applicant.
 - Bank statement from Commonwealth account held in joint names for period from 6 December 2016 to 8 February 2018.
 - A chronology of the matter dated 9 December 2018.

Tribunal proceedings

14. The issue in the present case is whether the visa applicant and the review applicant were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
15. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant at the hearing.
16. There were a number of inconsistencies in the review applicant's oral evidence and these were put to the review applicant in accordance with s.359A of the Act in a letter dated 29 April 2019. In that letter the Tribunal explained the relevance and the consequences of relying on that information in terms of his credibility. The evidence included:
- The visa applicant said that about 100 guests attended their wedding. This was inconsistent with the evidence given by the review applicant that about 20 to 30 guests attended their wedding.
 - The visa applicant said that the sister of the review applicant whom she lived with, organised the wedding and paid for it. This was inconsistent with the evidence the

review applicant gave at the hearing that his siblings organised and paid for the wedding.

- The visa applicant said he has five grandchildren aged from 14 years to 14 months. This was inconsistent with the evidence the review applicant gave that the visa applicant had four grandchildren.
- The visa applicant said that he would live with his sister when he came to Australia and he would work if he could. This was inconsistent with the evidence the review applicant gave that she and the visa applicant would rent a place together at Cabramatta when he came to Australia and that she was not sure if he would work.
- The visa applicant said he proposed to the review applicant in October 2016. He also said the engagement party had been held on 18 March 2016. The Tribunal asked him if he proposed after the parties got engaged and the visa applicant said yes that was correct. This was not consistent with the evidence given at the time of application that the parties met in Cambodia in October 2015, an engagement party was held on 18 March 2016 and the parties were married on 27 November 2016.

17. A submission in reply addressing each of the matters raised was received by the Tribunal on 12 May 2019. Those submissions have been taken into account and where relevant will be referred to below.
18. The Tribunal was concerned the review applicant was not able to answer questions put to her on matters the Tribunal considered she ought to have reasonably known, such as who paid for their wedding, which of his children were married and how many grandchildren the visa applicant had. The Tribunal was concerned the review applicant frequently sought to adjust her answers and sought wherever possible to evade giving an answer. The Tribunal did not consider it plausible that she could fail to remember such pertinent details. The Tribunal was concerned the answers the review applicant gave were deliberately vague in an attempt to not disclose any information she considered may be prejudicial to the claim. The lack of knowledge and the frequent shifting of evidence displayed by the review applicant were not consistent with the relationship the parties claimed to have. Whilst it is appreciated separation can be very difficult for parties and this stress can of itself lead to some inconsistencies in the evidence given, the Tribunal is not satisfied the explanations given are sufficient to overcome the cumulative effect of the inconsistencies.
19. The cumulative effect of the inconsistencies, coupled with the evasiveness of the review applicant, was such that the Tribunal did not consider her to be a credible witness.

Whether the parties are in a spousal or de facto relationship

20. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This

includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 27 November 2016 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

23. Financial

24. The review applicant resides with her sister-in-law (the sister of the visa applicant) at St Johns Park. Her sister-in-law has two adult children who also live at the property. She pays \$200 per week and that is inclusive of her food. She has lived there for around two years. Prior to that she had lived in a rental property at Cabramatta for around ten years. The review applicant is in receipt of an age pension and she receives between \$800 and \$900 per fortnight. She said she had not been in paid employment since she came to Australia with her then partner in 1990.
25. The Tribunal accepts the evidence of the visa applicant that he lives on a farm that he owns and he grows mangoes and sells water. He has lived on the farm for about five years. The farm is around 50 kilometres from Phnom Penh.
26. The parties have a joint goal saver account in Australia. The parties do not hold any other joint assets or liabilities.
27. The Tribunal accepts from the evidence provided that the review applicant has previously sent money to the visa applicant to assist him. They do not share day-to-day household expenses and each maintains their own bank accounts for day-to-day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in Cambodia.
28. The Tribunal places limited weight on this aspect of the relationship.

Nature of the household

29. It is accepted the parties have spent little time as part of the one household since their marriage in November 2016. On the evidence of the parties, they have spent less than two months as part of the one household since they married in November 2016.
30. Since the evidence was that when the parties had stayed together it was for short periods either in Cambodia at a place the review applicant rented or at a hotel in Siem Reap the Tribunal did not have before it evidence to make findings as to the nature of the household.
31. The parties gave inconsistent evidence about their plans as to where they would live when the visa applicant came to Sydney. Those matters were raised with the parties following the hearing under s.359A. In the submissions received it was put that the common intention of the parties was that they would reside with the sister of the visa applicant initially and when

established would rent their own place. The Tribunal does not place weight on this inconsistency but does place weight on the apparent lack of communication on pertinent issues such as where they would live.

32. The Tribunal places very limited weight on this aspect of the relationship given the limited periods of time the parties have spent as part of one household.

33. *Social aspects of the relationship*

34. At the time of application the review applicant provided witness statements from:

- Ms Sok Chin Chhai dated 11 April 2016 who stated the visa applicant was her brother and she had known the visa applicant for three years. She described how the parties had met the previous year at a family party when the visa applicant came to visit his mother who was ill at the time. She considered their relationship to be genuine and continuing.

35. At the time of hearing the Tribunal heard evidence from Ms Sok Yeng Chhai, a sister of the visa applicant. She told the Tribunal the review applicant had resided at her home for the past three years. She said her ex-husband had introduced the review applicant to the visa applicant and she considered their relationship to be genuine.

36. The Tribunal also heard from a friend of the review applicant Mrs Bory Em who had been a witness to the parties' marriage. She sees the review applicant on a daily basis as they visit each other and have meals together. She had not spent time with the parties when they were together apart from the time of their marriage.

37. The evidence in relation to this aspect of the relationship was somewhat lacking. The Tribunal did have the benefit of photographic evidence but it did not have the benefit of oral evidence from witnesses who had observed the parties together since their marriage. While accepting that the time spent together had been primarily in Cambodia the Tribunal was concerned there was no evidence from any of the visa applicant's six children. The evidence of both parties was that the visa applicant had not introduced his six children to the review applicant despite her having twice been to visit him in Cambodia. There was no evidence they had attended the engagement celebration. The Tribunal has placed weight on the omission of this evidence given the evidence of the visa applicant that he sees his children on a weekly basis. It is a reasonable inference from his weekly visits to his children that he considers them an important part of his life.

38. Nonetheless, based on the evidence available to it, the Tribunal accepts that the parties represent themselves to some members of their families as being married to each other and that their siblings consider them to be in a genuine and continuing spousal relationship.

39. *Nature of the relationship*

40. The evidence as to the parties' commitment to each other was, when considered in its totality, confused and unconvincing. While at the time of hearing the review applicant spoke of her commitment to the marriage and of establishing a life together with the visa applicant, the Tribunal was not convinced on the evidence that the commitment to the marriage was a mutual commitment.

41. Neither the visa applicant nor the review applicant was able to give specific evidence as to how their relationship developed, how many guests attended their wedding and who paid for it. The Tribunal was concerned the lack of specificity as to the development of the relationship was indicative of their not recalling actual events but of their making up

evidence. The visa applicant's account of when he proposed to the review applicant was indicative of this. The Tribunal is not satisfied that the inconsistencies in the evidence about when the visa applicant proposed marriage, how many people attended their wedding and who paid for the wedding was plausible in the context of two people committed to a shared life. The explanation provided in the submissions following the hearing did not offer a plausible explanation for the inconsistencies. Conflicts in the evidence about such events are in the Tribunal's view either indicative of the event not taking place or not taking place in the manner described.

42. The Tribunal was concerned at the lack of knowledge demonstrated by the review applicant about the visa applicant's family. The questions asked at the time of hearing were clear and if the parties did not understand what was being asked, they had the opportunity to bring that to the attention of the member. The review applicant was not able to tell the Tribunal the ages of the children of the visa applicant and whether they were married or not. She was confused as to the number of grandchildren he had. In the review applicant's evidence when he was asked as to why he had not introduced his children to his now wife he said she had not asked to meet them. On his evidence it was readily apparent the review applicant enjoyed a close relationship with his children and he saw them on a weekly basis. The apparent disinterest demonstrated by the review applicant was not indicative of a person in a committed relationship. In the context of the parties being separated, the Tribunal regards information about each other's family to be of importance when assessing the nature of the commitment of the parties to the relationship. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship.
43. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the visa applicant and the review applicant as being indicative of the relationship not being characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would. When this evidence was considered along with the conduct of the parties in not spending any significant periods of time with each other since their marriage, and of the review applicant not being introduced to the children of the visa applicant, the Tribunal was not satisfied both parties saw the relationship as long-term.
44. The Tribunal finds that the parties know each other personally and have socialised together on the limited occasions when the review applicant was in Cambodia. The Tribunal is satisfied there is ongoing communication between the parties. However, the Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the visa applicant is committed to a shared life as husband and wife to the exclusion of all others.

45. **CONCLUSION**

46. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is not satisfied that the parties live together or do not live separately and apart on a permanent basis. The Tribunal therefore finds that the visa applicant does not meet the definition of 'spouse' in s.5F (2) (b)–(d).
47. As the parties were married at the time of application, the applicant cannot satisfy cl.309.211(3).

48. As the visa applicant does not meet the definition of spouse, he does not meet the requirements of cl.309.211 or cl.309.221.
49. For the reasons above, the Tribunal finds the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

50. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.
- 51.
52. Moira Brophy
53. Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

54.